

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**STEVEN SPRADLEY**  
Claimant

VS.

**CUSTOM CAMPERS, INC.**  
Respondent  
Self-Insured

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Docket No. 231,178

**ORDER**

Claimant requested Appeals Board review of Administrative Law Judge Jon L. Frobish's October 12, 2001, Award. The Appeals Board heard oral argument on March 19, 2002.

**APPEARANCES**

Claimant appeared by and through his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, John I. O'Connor of Pittsburg, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

**ISSUES**

This is a claim for bilateral upper extremity injuries caused by claimant's repetitive work activities while employed by the respondent. The Administrative Law Judge (ALJ) found as a result of claimant's bilateral upper extremity injuries that he suffered a 6 percent whole body functional impairment. On February 4, 2000, respondent, based on economic conditions, laid claimant off from its employment. After claimant's layoff, the ALJ found claimant entitled to a 9.5 percent work disability based on a 0 percent work task loss averaged together with a 19 percent wage loss.

Claimant appeals and contends he is entitled to a higher work disability award. Claimant argues he proved he had an 18 percent work task loss and a 100 percent wage loss entitling him to a 59 percent work disability.

Conversely, respondent, in its brief, argues that claimant only proved he suffered a scheduled permanent injury to his right upper extremity and is not entitled to a permanent partial general disability based on a whole body functional impairment or a work disability. Moreover, even if claimant is found to have suffered a work-related bilateral upper extremity injury, respondent argues claimant is not entitled to a work disability award because he returned to work following his injury at an unaccommodated job earning the same wage as he earned pre-injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board agrees with and affirms the ALJ's findings: (1) that claimant proved he suffered bilateral upper extremity injuries as a result of his work activities while employed by the respondent, (2) that the bilateral upper extremity injuries resulted in a 6 percent whole body functional impairment, (3) that as a result of those permanent injuries, permanent restrictions were imposed on claimant's work activities by both treating and evaluating physicians, (4) that claimant did not return to his regular employment because of those restrictions and was placed in accommodated employment, and (5) that respondent laid claimant off of work for economic reasons and claimant is therefore entitled to a work disability.

But the Board finds claimant's work disability should be increased from the 9.5 percent awarded by the ALJ to 53.5 percent because the Board finds that claimant proved he suffered a 7 percent work task loss and a 100 percent wage loss.

The ALJ found that orthopedic surgeon Dr. Dale E. Darnell's work task loss opinion was "incomplete and nearly incomprehensible." Thus, the ALJ found claimant had not proven a work task loss. The Board generally agrees with that analysis. But finds that Dr. Darnell did clearly express an opinion that claimant's permanent restrictions would not allow claimant to perform the job task of using hand and power tools and the job task of repairing roofs that required claimant to occasionally lift up to 50 pounds.

Vocational expert Jerry Hardin had compiled a list of 28 job tasks claimant had performed in the 15 years next preceding his work accident. Based on Dr. Darnell's permanent restrictions, Mr. Hardin determined that claimant could not perform 24 of the 28 tasks for an 86 percent task loss. Dr. Darnell, however, had not been given the opportunity to review Mr. Hardin's task loss analysis until his deposition testimony. Dr. Darnell did not adopt Mr. Hardin's task loss opinion. In fact, Dr. Darnell attempted to

review each task, but because he was not familiar with the tasks, or with Mr. Hardin's abbreviations as to the physical requirements of each of the tasks, Dr. Darnell was only able to express a definitive opinion on two of the 28 tasks.

Claimant last testified in this case by deposition on May 8, 2001. At that time, claimant was unemployed and had not been able to find any employment since respondent had laid him off on February 4, 2000. Claimant testified that he received unemployment benefits for 20 weeks after he was laid off. Claimant fulfilled the unemployment agency's requirement of actively seeking employment during that 20 week period. Additionally, claimant named nine different places he had made application for employment. Claimant further indicated that he had applied for employment with other employers, but he could not recall those employer's names. Claimant also established that he was continuing to look for employment at the time of his deposition. Moreover, in January 2001, claimant applied for vocational retraining with the Department of Social and Rehabilitation Services and had been accepted into its retraining program.

An injured worker is entitled to permanent partial general disability compensation in excess of his permanent functional impairment if the worker's post-injury wage is not equal to 90 percent or more of his pre-injury wage.<sup>1</sup> The fact finder is required to make a finding whether or not claimant made a good faith effort to find appropriate employment after recovering from work related injuries. If a finding is made that the worker did not make a good faith effort, the fact finder is required to determine an appropriate post-injury wage based upon claimant's ability rather than the difference in actual pre and post-injury wages.<sup>2</sup>

Here, the ALJ did not make a specific finding of bad faith, but nevertheless imputed a post-injury average weekly wage based on Jerry Hardin's opinion that claimant could earn \$280 per week. The Board disagrees with that finding. The Board concludes that claimant's testimony, in regard to his efforts to find post-injury employment after he was laid off on February 4, 2000, is uncontradicted. The Board, therefore, finds claimant established that he made a good faith effort to find employment. Because claimant was unable to find appropriate employment, claimant further established good faith by taking the further step toward securing employment by applying for and being accepted into a vocational retraining program. Thus, the Board concludes claimant is entitled to a 100 percent wage loss in computing his work disability.

Averaging claimant's 7 percent task loss with his 100 percent wage loss, the Board finds claimant is entitled to a 53.5 percent work disability. The parties stipulated to a November 14, 1997, accident date. But claimant remained employed with respondent until

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<sup>1</sup> See K.S.A. 1997 Supp. 44-510e(a).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

he was laid off on February 4, 2000. Thus, claimant is entitled to 1.29 weeks of temporary total disability compensation plus 24.9 weeks of permanent partial disability compensation based on claimant's 6 percent permanent functional impairment for the period between his date of accident of November 14, 1997, and the date he was laid off on February 4, 2000. Then commencing February 5, 2000, claimant is entitled to 197.13 weeks of permanent partial disability compensation for a 53.5 percent permanent partial general disability.

The Board also adopts and incorporates into this Order the findings and conclusions contained in the ALJ's Award that are not inconsistent with the Board's findings and conclusions contained herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Jon L. Frobish's October 12, 2001, Award should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Steven Spradley, and against the respondent, Custom Campers, Inc., a qualified self-insured, for an accidental injury which occurred on November 14, 1997, and based upon an average weekly wage of \$519.62

Claimant is entitled to 1.29 weeks of temporary total disability compensation at the rate of \$346.43 per week or \$446.89, followed by 24.9 weeks of permanent partial disability compensation at the rate of \$346.43 per week or \$8,626.11, for a 6 percent permanent partial general disability through February 4, 2000, thereafter commencing on February 5, 2000, claimant is entitled to 197.13 weeks of permanent partial disability compensation at the rate of \$346.43 per week or \$68,291.75, for a 53.5 percent permanent partial general disability, making a total award of \$77,364.75.

As of July 31, 2002, there would be due and owing to claimant 1.29 weeks of temporary total disability compensation at \$346.43 per week, or \$446.89, plus 154.61 weeks of permanent partial disability compensation at \$346.43 per week or \$53,561.54, for a total sum of \$54,008.43, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$23,356.32 should be paid at \$346.43 per week, until fully paid or until further order of the Director.

All other orders contained in the Award are adopted by the Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant  
John I. O’Conner, Attorney for Respondent  
Jon. L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director